No. 82-2056

In The

Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER CO., et al.,
Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA BAND OF MISSION INDIANS

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QUESTIONS PRESENTED

1. Whether, in issuing a license for a hydroelectric project that utilizes reservation lands pursuant to Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), the Federal Energy Regulatory Commission may modify or reject license conditions deemed "necessary for the adequate protection and utilization" of the reservation by the Secretary with supervisory authority over the reservation.

2. Whether Indian water rights are "reservations" within the meaning of Section 3(2) of the Federal Power Act, 16 U.S.C. §796(2) and if so, whether reservations situated directly downstream from a hydroelectric project whose reserved water rights will be affected by the project qualify for the protections afforded reservations under Section 4(e) of the Federal Power Act.

3. Whether Section 8 of the Mission Indian Relief Act, 26 Stat. 712, 714, considered in conjunction with Section 4(e) of the Federal Power Act, requires a Commission licensee, whose project is designed primarily to convey water across Mission Indian reservation lands, to obtain rights-of-way from the Mission Bands whose reservations are traversed by the water conveyance facilities.

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STATUTES INVOLVED

The provisions of the Mission Indian Relief Act (MIRA), 26 Stat. 712 (1891), and the most pertinent provisions of the Federal Power Act (FPA), 16 U.S.C. §§791a *et seq.*, are set forth in the Appendix to the Brief for the Secretary of the Interior.

STATEMENT OF THE CASE

The respondent Indian Bands adopt the Statement of the Case in the Brief for the Secretary of the Interior.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case arises under the relicensing provisions of the Federal Power Act (FPA). FPA Section 6, 16 U.S.C. §799, provides that the maximum term for any hydroelectric project is fifty years. When the original license expires, a new license can be granted to a new licensee or to the original licensee or the project can be taken over by the United States. FPA Sections 14 and 15, 16 U.S.C. §§807, 808. Although the Act grants a preference for applications by states and municipalities, FPA §7(a), 16 U.S.C. §800(a), original licensees are not entitled to any preference in relicensing proceedings. *See* 59 Cong. Rec. 1532-33 (1920); J. Kerwin, *Federal Water-Power Legislation* 189, 192 (1926).

The FPA's relicensing provisions were among its most important and controversial aspects. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 419-28 (1940); J. Kerwin, *Federal Water-Power Legislation* 189, 192, 195-96, 223-40, 260 (1926). The Act precisely spells out the rights of original licensees in the event the license is awarded to the government or to a new licensee. In return for obtaining original licenses, the original licensees are required to agree to turn over all licensed facilities and properties, including the private property that they bring to the project, at the expiration of the original license period. FPA Sections 3(11), 7(c), 14, 15, 16 U.S.C. §§796(11), 800(c), 807, 808; *United States v. Appalachian Electric Power Co., supra.* If a new license is awarded to a new licensee or if the United States exercises its right to recapture, the original licensee is entitled to its "net investment" and to certain severance damages. FPA Sections 3(13), 14, and 15, 16 U.S.C. §796 (13), 807, 808. The FPA also provides for new licensees

and the United States to assume certain contractual obligations. FPA Sections 14(a), 15, 22, 16 U.S.C. §§807(a), 808, 815. *See* Pet. App. 312-27. The point of these provisions

> is to have the Government at the end of the term unembarrassed, with its hands absolutely free and no system of equities built up by a licensee, by which he would force the government, either by law or sentiment, into a new arrangement with him.

Hearings on Water Power Before the House Committee on Water Power, 65th Cong., 2d Sess. 680-81 (1918).

2. The Petitioners in this case are seeking to obtain the use of Indian tribal lands without the Tribes' consent in order to take away water that otherwise would be available for the Indian reservations. Nothing in the two relevant statutes, the FPA and MIRA, authorizes the abrogation of Indian rights or the taking of tribal lands for purposes that are inimical to the Indians' best interests. To the contrary, both the FPA and MIRA were intended to benefit, protect, and preserve the integrity and the purposes of Indian reservations.

3. The reservation proviso to Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e), is fundamental to all three issues under review. The proviso qualifies the Commission's authority to issue hydroelectric licenses involving federal reservations by stating:

> That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

4. The first question presented is whether the reservation proviso means what it so plainly says, that the

Commission's licenses "shall be subject to and contain" the conditions that the appropriate Secretary deems necessary for the reservations' adequate protection. There is no ambiguity in the statute or its history. The proviso's plain meaning is consistent with several other provisions of the FPA which vest final authority over particular licensing matters in federal officials other than the Commission. It is also supported by all of the applicable canons of construction. The policy considerations urged by the petitioners and the Commission are not material to this question of statutory construction because the Court is not at liberty to appraise the wisdom of a particular course consciously selected by Congress and Congress obviously did not make the policy choices advocated by the Commission and the petitioners.

5. The second question is whether the three Indian reservations which are located downstream from licensed project works, but whose water rights are affected by the project, qualify for the protection of the reservation proviso. Indian water rights are clearly encompassed in the FPA's definition of reservations, "interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." FPA Section 3(2), 16 U.S.C. §796(2). There is no indication that the single word "within" as used in the reservation proviso was intended to deprive reservations that are significantly affected by a licensed project of the protection afforded by the reservation proviso. There are several reasons not to accord controlling significance to that one word. It would be contrary to the text of two other FPA provisions and also would undermine the evident protective purposes of both the reservation proviso and the Act's expansive definition of "reservations." Once it is determined that

a reservation's water rights are affected by a project and that the reservation therefore is covered by the Section 4(e) proviso, the nature and scope of any conflicting legal claims and legal rights to water are irrelevant to the issues that must be addressed by the appropriate Secretary and the Commission.

6. The third issue presented in this case involves the relationship between the reservation proviso and Section 8 of the Mission Indian Relief Act (MIRA). Section 8 provides that private parties can obtain rights of way for water conveyance facilities across MIRA Reservations by entering into a contract with the Indian owners which must be approved by the Secretary of the Interior. There are no clear indications in the FPA that Congress intended to abrogate the tribes' general power to prevent uses of land without their consent or any specific powers and rights vested in Indian tribes by treaty or statute. Giving full effect to Section 8 is entirely consistent with the FPA because the reservation proviso negates any possible inference that the Act was intended to authorize uses of tribal lands in a manner that is detrimental to the Indian owners. The reservation proviso also manifests Congress' intent not to abrogate preexisting rights and powers of Indian tribes. Moreover, the issuance of canal rights of way for this particular project should be governed by Section 8 in any event because the project's primary purpose is the conveyance of water, not the development of hydroelectric power, and Section 8 of MIRA is much more closely and specifically associated with the substance of this controversy than the FPA. Any doubts concerning this issue of statutory construction must be resolved in the Indians' favor.

ARGUMENT

I.

The Mission Indian Relief Act and The Federal Power Act Were Designed to Protect and Benefit Indian Reservations

The three specific issues raised by the petitioners in this case concern the construction of Sections 3(2) and 4(e) of the Federal Power Act (FPA) of 1920, 16 U.S.C. §§796(2), 797(e), and the relationship between FPA Section 4(e) and the Mission Indian Relief Act (MIRA) of 1891, 26 Stat. 712, particularly Section 8 of that Act, 26 Stat. at 714. Before turning to those specific questions, however, it is important and useful to review the history, tenor and purpose of both MIRA and the FPA.

A. The Mission Indian Relief Act

The severe plight of the Mission Indians of Southern California was brought to the attention of the Nation and the Congress by an 1883 report by two Interior Department officials, Helen Hunt Jackson and Abbot Kinney. S. Ex. Doc. 49, 48th Cong., 1st Sess. 7-37 (1884), reprinted in S. Rep. 74, 50th Cong., 1st Sess. (1888). It told of the horrendous conditions under which the Indians were living. "[T]heir history has been one of almost incredible long-suffering and patience under wrongs." S. Ex. Doc. 49, *supra*, at 8-9. Although recognizing that "now it is, humanly speaking, impossible to render to them full measure of justice," the Report noted that it is within "our power to make them some atonement," and that, even aside from past injustices, the Mission Indians "are deserving of help on their own merits." *Id.*, at 10.

Jackson and Kinney paid special attention to the imperative need to secure the few remaining good irrigable lands with adequate water supplies for the Mission Bands.

> There is no government land remaining in Southern California in blocks of any size suitable for either white or Indian occupancy. The reason that the isolated little settlements of Indians are being now so infringed upon and seized, even at the desert's edge and in stony fastnesses of mountains, is that all of the good lands, i.e. land with water or upon which water can be developed, are taken up.

Id., at 14.[1] They recommended that land with safe and secure boundaries be set aside for each band or village of Mission Indians, that all non-Indians living within the reservations be removed, *Id.*, at 10-11, and that trust patents be issued for whatever lands were eventually set aside so as to insure the permanence of Indian ownership, *Id.*, at 11-12.

> The insecurity of reservations made merely by Executive Order is apparent. . . . The insecurity of reservations set apart by act of Congress is only a degree less. The moment it becomes the interest and purpose of white men in any section of the country to have such reservation tracts restored to the public domain, the question of it being done is only a question of influence and time. It is sure to be done. The future of these industrious, peaceable, agricul-

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[1]See *also*, H.R. Ex. Doc. 45, 50th Cong., 1st Sess. 2 (December 24, 1887 letter from Commissioner of Indian Affairs noting the "urgent need of aid from the Government to develop the water supply by irrigation through the several [Mission Indian] reservations"); S. Rep. 74, *supra*, at 3 ("Much of the land is valueless without irrigation, and the Indians are being deprived of their water rights wherevere and whenever the interests of the whites demand the appropriation of such rights"). Similarly, H.R. Rep. 2556, 49th Cong., 1st Sess. 1 (1886), states:

> . . . . We have permitted these Indians to be driven year after year from these lands, yielding up to the rapacious land-grabbers village after village and valley after valley which they had reclaimed from desert waste, by irrigation rendered rich and fertile.
>
> Had their rights been guarded for even a short time after their accession they would have easily become part of our civilization, and aided greatly to simplify, instead of complicate, one of the great problems of our time.

> tural communities ought not to be left a single day longer than is necessary, dependent on such changes; changes which are always against and never for the Indians' interests in the manner of holding lands.

Id., at 12.[2] *See also*, Int. Br. 2-4.

The Jackson-Kinney report led to the submission of a proposed bill to Congress by the Interior Department in 1884 for the relief of the Mission Indians. The bill, as amended, was eventually enacted as the Mission Indian Relief Act on January 12, 1891. 26 Stat. 712. The Act provided for the appointment of three commissioners by the Secretary of the Interior "to arrange for a just and satisfactory settlement of the Mission Indians . . . upon reservations" (Sections 1 and 7); the selection by the commissioners of reservations for each band or village of Mission Indians which correspond as closely as possible to the lands they occupied and possesed and are "sufficient in extent to meet their just requirements" (Section 2); the issuance of permanent trust patents for the reservations selected by the commissioners (Section 3); the allotment of reservation lands (Section 4); the issuance of permanent trust patents for the allotments and the prohibition of any conveyances of the allotments "or of any contract[s] . . . touching the same" prior to the expiration of the trust period (Section 5); the filing and defense of lawsuits by the Attorney General to protect the Indians' legal and equitable rights (Section 6); and procedures to obtain rights of way for water conveyance facilities (Section 8).

Following the appointment of the three-member Commission pursuant to Section 1 of MIRA and the comple-

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[2] See Hynes v. Grimes Packing Co., 337 U.S. 86, 103-04 & n.24 (1949) (citing MIRA reservations as example of congressional intent to vest Indians with permanent, compensable property rights as opposed to mere rights of occupancy).

tion of its report, reservations were established for the various bands and villages throughout Southern California. *See* Int. Br. 3-4.[3] One revealing indication of the extraordinary care, solicitude and attention that the federal government paid to insuring protection of the Mission bands' property interests was that "upon nearly all sides" the boundaries of the La Jolla Reservation were drawn to encompass "considerable mountain land worthless for any purpose except to prevent encroachments by others upon [the reservation's water, arable land and grazing land.]" III Ninth Cir. Joint App. 1073-74. Tragically and ironically, it is those very same mountain lands which house the encroachments that are the subject of this case.

MIRA, its legislative history and its subsequent implementation reveal the federal government's awareness of the unique difficulties faced by the Mission Indians of Southern California and its determination to overcome the problems that had plagued those Indians for decades. Particular attention was focused on the imperative needs to preserve the integrity of their reservations and to provide the Mission bands and villages with sufficient irrigable land and water to enable them to become economically self-sufficient. The government did everything

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[3]The December 3, 1891 Report of the Commission is replete with references to the overriding importance of securing good, irrigable lands with available water supplies for the bands and villages within the watershed of the San Luis Rey River. *See, e.g.*, III Ninth Circuit Joint App. 1066, 1070, 1073-74, 1110-11.

Many Mission Bands had occupied reservations established by Presidential Executive Orders prior to MIRA's enactment. *See* 1 C.J. Kappler, Indian Affairs—Laws and Treaties 819-24 (1904). In particular, the lands of the La Jolla and Rincon Reservations encompassed in Project No. 176 were originally set aside as Indian Reservations by Executive Orders in 1875 and 1881. *See* II Ninth Cir. Joint App. 456-460; 1 C.J. Kappler, *supra*, at 820, 822.

within its power to insure that the Indians' land and water rights would be fully and adequately protected and that their historical nightmare would end.

B. Section 8 of the Mission Indian Relief Act

Section 8 of MIRA was not included in the original bills prepared by the Interior Department. Attention focused on the need for a provision authorizing the issuance of rights of way for water conveyance facilities across the Mission Reservations as a result of certain proposals made by several Southern California water companies in the late 1880s.

As enacted by the Congress, Section 8 provides different procedures for obtaining rights of way depending on whether or not trust patents had been issued for the particular lands in question. Prior to the issuance of such patents, the Secretary of the Interior could grant canal rights of way, but only "upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such others terms as he may prescribe." By contrast, once patents were issued, anyone wanting a right of way was required to enter into a contract with the tribe, band, or individual for whose use and benefit the lands are held in trust by the United States, "which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose."

The genesis of Section 8 were applications for rights of way for canals or flumes across the preexisting Mission Indian Reservations filed in the late 1880s by Southern

California water companies. The BIA agent believed that the proposals would benefit the Indians. Upon being advised of the applications, the Commissioner of Indian Affairs stated that "[t]he lands set apart and reserved for the Indians ought not to stand in the way of the development and occupation of the surrounding country, when no interests of the Indians can be injured thereby," but noted that the Department lacked legal authority to approve the proposed contract. *See* H. R. Rep. 3282, 50th Cong., 1st Sess. 3 (1888).[4] Owing to the absence of such statutory authority, the Commissioner proposed amending the then pending bill to enable the Secretary of the Interior to grant rights of way for water conveyance facilities and short railroad lines across Mission Reservations. *Ibid.* The proposed amendment was identical to Section 8 as ultimately enacted except that the Secretary's authority to grant pre-patent rights of way was not subject to the condition that the Indians be supplied with sufficient water for irrigation and domestic purposes. *See* Pet. App. 19-20.

The House Committee on Indian Affairs recommended the enactment of the MIRA bill with the Interior Department's proposed amendment, H. R. Rep. 3282, *supra*, at 1, but the bill died in the House. In the next Congress, the Act again passed the Senate without Interior's amendment. H. R. Rep. 3251, 51st Cong., 2d Sess. 3 (1890).[5]

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[4]The Commissioner's letter made reference to an Attorney General's Opinion, 18 Ops. A.G. 563 (1887) which in turn relied on an earlier opinion, 16 Ops. A.G. 553 (1880). Both opinions held that the Interior Department could not approve or enter into contracts conveying Indian property interests in the absence of authorizing legislation.

[5]In April, 1890, the Senate passed a resolution, 21 Cong. Rec. 3596, directing the Secretary of the Interior to inform the Senate of all the circumstances pertaining "to the occupation of

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The Commissioner of Indian Affairs then urged the House to act on the bill (it had passed the Senate for the fourth time) and to consider the inclusion of the Interior Department's suggested amendment if it "would not jeopardize its passage." H. R. Rep. 3251, 51st Cong., 2d Sess. 3 (1890).

The House Committee recommended enactment of the Senate bill. H. R. Rep. 3251, *supra*. But on the House floor, the Chairman of the Committee moved to amend the Senate bill by adding Interior's proposal as a new provision, Section 8. 22 Cong. Rec. 311 (1890). In explanation, he stated:

> I will say that the amendment was prepared by the Indian Office and has the sanction and endorsement of the Interior Department. It was also reported favorable by our committee in the Fiftieth Congress. It seems to be in keeping with the interest of these Indians. These lands are dry, arid lands as a rule, and it is necessary that there should be some order of this character, or at least a provision made in this bill, authorizing the Secretary of the Interior to grant these rights of way.

22 Cong. Rec. 311. The amendment was adopted, 22 Cong. Rec. 312, and so was the bill, 22 Cong. Rec. 313.

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any portion of the Capitan Grande and the La Jolla Reserves of the Mission Agency in California by persons not Indians for ditches and flumes." The Senate Resolution specifically inquired "by what authority and under what right such occupation, if any, is maintained and what steps, if any, have been taken by the Department to protect the Indians in their rights with reference to the same." The Interior Department's response, with all of its supporting documentation, was reproduced in S. Ex. Doc. 118, 51st Cong., 1st Sess. (1890).

It is significant that the Senate was concerned enough about the water and water-related problems of the Mission Indians to adopt a resolution requiring a full report from the Interior Department and to publish the reply. Both the substance and the tone of its resolution reveal that the Senate was skeptical of the Interior Department's willingness and ability to protect the Mission Indians' precious water resources.

The bill, as amended by the House, then went to conference with the Senate. The conferees adopted the House amendment with one significant change. All pre-patent canal rights of way granted by the Secretary were made subject to the condition that the Indians be supplied sufficient water for irrigation and domestic purposes. As amended by the conferees, the full Senate adopted the bill. 22 Cong. Rec. 554 (1890). In the House, the conferees explained that the amended bill would "better secure and protect the rights and privileges of the Indians in and to their reservation lands." 22 Cong. Rec. 786 (1890). The House then followed suit, and MIRA was finally enacted and signed by the President.

Section 8 and its legislative history are significant for several reasons. They manifest Congress' awareness of the critical need of the Mission Indian Reservations for water and Congress' determination to protect that precious resource for use by the Indians and to prevent any interference by non-Indians. By its unwillingness to grant the Secretary unlimited authority over the issuance of canal rights of way prior to the issuance of trust patents, Congress revealed its skepticism of the Interior Department's ability to protect the Indians' most vital resource. Section 8 and its legislative history also reflect the judgments of both the Interior Department and the Congress that once patents for the reservations were issued, the Indian landowners themselves would be in the best position to determine in the first instance whether canal rights of way should be granted.[6] While contracts entered into by the

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[6]In this connection, the 1890 Annual Report of the Interior Department stated: "The Mission Indians have arrived at that period in human progress where they should no longer be classed as Indians, but as citizens. . . . In nearly every village I find more or less good, intelligent, industrious men, fitted for

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Indians were made subject to approval by the Secretary, the Secretary was not authorized to issue rights of way in the absence of contracts with the Indian owners. *Cf. Poafpybitty v. Skel'y Oil Co.*, 390 U.S. 365, 372 (1968); *Mott v. United States*, 283 U.S. 747, 751 (1931).

C. The Federal Power Act

The Federal Power Act "neither overlooks nor excludes Indians or lands owned or occupied by them." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960). "Tribal lands within Indian reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws" are included in the Act's definition of "reservations," §3(2), 16 U.S.C. §796(2), and the Commission's grant of authority encompasses hydroelectric projects "upon" or "affecting" such reservations, §§4(e), 23(b), 16 U.S.C. §§797(e), 817. The FPA also provides for the payment of compensation for the use of "tribal lands embraced within Indian reservations." §10(e), 16 U.S.C. §803(e).

But the authority delegated by the Federal Power Act to the Commission over Indian lands is subject to two significant qualifications set forth in the first, or reservation, proviso to Section 4(e), 16 U.S.C. §797(e). That proviso states:

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citizenship." Attach. 5-01 to Ex. A-1, COR 2055, 2056-57. It was not common at that time for Indian tribes to be delegated such authority. Other contemporaneous statutes either granted canal and ditch rights of way over Indian reservations directly, e.g. Act of January 1, 1889, 25 Stat. 639 (Papago Reservation); Act of February 10, 1891, 26 Stat. 745 (Umatilla Reservation); Act of January 20, 1893, 27 Stat. 420 (Yuma Reservation), or vested authority over such rights of way in the Secretary, e.g., Section 1 of the Act of March 1, 1899, 30 Stat. 924, 941 (Uintah Reservation); Act of March 3, 1891, 26 Stat. 1101, 43 U.S.C. § 946 (partially repealed).

> That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.[7]

There are several noteworthy aspects of this proviso. First, the qualifications on the Commission's authority are absolute; they admit of no exceptions. Licenses within reservations may be issued "only after" the required finding by the Commission. They must also "be subject to and contain" the protective conditions deemed necessary by the appropriate Secretary. Second, the two requirements are conjunctive. Licenses cannot be issued unless the Commission makes the interference/inconsistency finding *and* must contain the Secretary's conditions. Third, the proviso expressly differentiates between the roles of the Commission and the appropriate Secretary. The Commission is empowered to determine whether the license interferes or is inconsistent with the purpose of reservations, whereas it is the Secretaries' responsibility to formulate and prescribe the conditions deemed necessary for the reservations' adequate protection and utilization. Fourth, the protections afforded reservations are extremely stringent. The license must be consistent with the reservations' purposes. Any interference with those purposes is prohibited. And the Secretaries' conditions must insure not only the

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[7]Another limitation contained in one of the 1935 amendments to the FPA is that the annual charges fixed by the Commission for the use of tribal lands are "subject to the approval of" the affected Indian tribe. § 10(e), 16 U.S.C. § 803(e). The meaning and scope of that provision was raised and argued below but was not decided by the Court of Appeals and is not encompassed in the questions presented to this Court.

reservations' adequate protection, but also their utilization.

The obvious purpose of the reservation proviso is to insure that the interests and the welfare of reservations subject to its protection are not subordinated to the requirements of hydroelectric projects. The needs of the reservations are primary.[8] This plain meaning of the reservation proviso is entirely consistent with, and given added force by, other provisions of the Federal Power Act, the Act's legislative history, and its contemporaneous, administrative construction.

In addition to the reservation proviso, several other sections of the Act explicity vest authority over various aspects of hydroelectric licenses in other federal officials. *See* Int. Br. 19-20. Viewed in the context of the entire Act, the reservation proviso is not an aberration. Rather, the primacy of reservation interests is parallel to other provisions of the statute which subordinate the Commission's licensing jurisdiction over hydroelectric projects to other federal concerns, maintaining the navigable capacity of waterways, operating fishways, conserving fish and wildlife resources, and regulating navigation. In all of these areas, the FPA expressly delegates ultimate authority to federal officials other than the Commission. This aspect of the Act was noted in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 164 & n.9 (1946), in which

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[8]It is not uncommon for Congress to make the exercise of authority by one federal agency subject either to the review or the conditioning authority of other agencies. *See, e.g.*, 16 U.S.C. § 1536 (interagency cooperation and consultation required to insure conservation and preservation of endangered and threatened species); 30 U.S.C. § 352 (Secretary of the Interior authorized to enter into mineral leases of lands acquired by the United States subject to the consent of, and the conditions prescribed by, the head of the agency having jurisdiction over those lands).

the Court contrasted the limited role of the States under the statutory scheme with "the 'comprehensive' planning which the Act provides shall depend upon the judgment of the . . . Commission *or other representatives of the Federal Government*," citing, *inter alia*, FPA §4(e), emphasis added. *See also*, 328 U.S. at 167-68.

The legislative history of the reservation proviso also confirms its plain meaning. *See* Int. Br. 24-27. There is no doubt that the executive officials who drafted the Act and the members of Congress who enacted it knew precisely what they were doing. They made sure that the Commission's licensing jurisdiction would not take precedence over such paramount federal interests as the maintenance and regulation of navigation and the preservation of the integrity of Indian and other federal reservations.

The Commission's own *contemporaneous* construction of the Federal Power Act also demonstrates that Indian interests cannot be subordinated to the beneficiaries of hydroelectric projects. In 1929, the Commission considered a proposal for the development of a power site on the Flathead Indian Reservation. The non-Indian settlers on a federal irrigation project within that Reservation claimed that the tribally owned power site should be used to subsidize the project by providing "cheap power" for pumping and other purposes. This proposal was considered and rejected by the Commission's Senior Attorney in an extensive Memorandum to the Executive Secretary of the Commission.[9]

The memorandum analyzes the pertinent provisions of the FPA and states (at p. 23) that "[t]he function of

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[9]This memorandum is included in the COR at 24,399-427. A copy has also been lodged with the Supreme Court Clerk.

the Secretary of the Interior in such cases, apart from his membership on the Commission and his authority to designate personnel from his department to perform work for the commission, is, under Sec. 4(d) [now 4(e)], to prescribe conditions to be inserted in the license for the protection and utilization of the reservation." COR 24,421. The memorandum's conclusion was that neither the Federal Power Act nor any other statute applicable to the proposed Flathead development detracted from or abrogated the federal government's fiduciary obligations to the Tribes on the Flathead Reservation. The Commission's treatment of the Flathead project is especially significant because it was the first, major Indian project to be considered for licensing and accordingly was viewed a test case. *See Montana Power Company v. FPC*, 445 F. 2d 739, 751 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 1013.

The major flaw in the arguments of the petitioners and their allies is their entirely unsupported and unfounded assumption that the Federal Power Act authorizes the subordination of reservation and Indian interests to those of hydroelectric developments. To the contrary, the Act, its legislative history, and its contemporaneous administrative construction unquestionably show that it was intended to preserve and strengthen the fiduciary relationship between the United States and the Indian tribes with regard to their trust property. The delegation of management authority over tribal property to the Commission and the Secretary of the Interior is not in any way inconsistent with that fiduciary relationship, *United States v. Mitchell*, 103 S.Ct. 2961, 2972 & n.29 (1983), especially where, as here, that delegation is qualified by provisions designed for the special benefit and protection of Indian reservations.

II.

The Secretary's Section 4(e) Conditions Are Mandatory

With this background in mind, the first specific issue to be addressed is whether the Commission may modify or reject the Secretaries' Section 4(e) conditions.[10]

It is hard to imagine a clearer statutory directive. Licenses for hydroelectric projects issued by the Commission "shall be subject to and contain" conditions that the appropriate Secretary "shall deem necessary" for the reservations' "adequate protection and utilization." The language, "licenses shall be subject to and contain conditions," is definitive and admits of no ambiguity. It is worlds apart from other phrases that might have been used to subordinate the Secretaries' authority to the Commission's, such as "the Secretaries may recommend" conditions or "the Commission may include conditions recommended by the Secretaries." *See* Int. Br. 22 n. 25.

Petitioners and the Commission focus their attention on the single word "shall", Comm. Br. 20-21; Pet. Br. 36-37, ignoring the rest of the phrase as well as the structure of the reservation proviso. *See United States v. Rodgers*, 103 S. Ct. 2132, 2149 (1983). But the obvious inference to be drawn from the language, particularly the clause, "subject to and contain such conditions as the Secretary . . . shall deem necessary" is that the Secretary's §4(e) conditions must be included in the license. Though

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[10]The Petitioners contend that the reservation proviso does not apply to new licenses issued under FPA § 15(a), 16 U.S.C. § 808(a). Pet. App. 42-44. The short answer is that Section 15(a) authorizes the issuance of new licenses "upon such terms and conditions as may be authorized or required under the then existing laws and regulations," and the reservation proviso to Section 4(e) is plainly an "existing law." Lac Courte Oreilles Band v. FPC, 510 F.2d 198, 205 n.22 (D.C. Cir. 1975). *See also*, Int. Br. 21 n. 24.

not impossible, it would be odd for the permissive word "may" to be employed in conjunction with the clause, "subject to *and* contain". In Congress' intent were to treat the Secretary's conditions as advisory, it is far more likely that it would have simply used the verb "recommend".

The mandatory nature of the Secretary's conditions is also reinforced by the structure of the proviso which carefully spells out the respective responsibilities of the Commission and the Secretaries over reservations. Since the Commission was assigned a specific task, determining whether licenses interfere or are inconsistent with the purposes of reservations, it is most unlikely that Congress intended that the Commission also perform the additional function of reviewing the Secretaries' conditions. The language of the reservation proviso itself is cogent proof that Congress knew how to differentiate between the respective responsibilities of the Secretaries and the Commission and that it did not intend to subordinate the Secretaries' condition power to the Commission's licensing authority. It also demonstrates that Congress specifically intended to provide dual safeguards for reservations, the Commission's interference/inconsistency finding *"and"* the Secretaries' protective conditions.

The petitioners and their allies bear an extremely heavy burden in attempting to persuade a court to adopt a construction of a statute that so flagrantly contradicts its plain meaning. When the terms of a statute are unambiguous, our inquiry comes to an end, except in rare and exceptional circumstances." *Howe v. Smith*, 452 U.S. 473, 483 (1981). "Where [Congress'] will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982), *quoting Con-*

sumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). The Court is not at liberty to appraise the wisdom of a particular course consciously selected by Congress. *Rubin v. United States*, 449 U.S. 424, 431 n.8 (1981). Indeed, in resolving issues of statutory construction, "questions of public policy cannot be determinative of the outcome unless specific policy choices fairly can be attributed to Congress itself." *Dawson Chemical Co. v. Rohm & Hass Co.*, 448 U.S. 176. 220 (1980). Even if the Court were convinced that the plain meaning of the law produces results that are "mischievous, absurd, or otherwise objectionable, . . . the remedy lies with the law making authority, and not with the courts." *Griffin v. Oceanic Contractors, Inc., supra*, 458 U.S. at 575, *quoting Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

The Court of Appeals properly rejected the argument that the Secretaries' powers under the reservation proviso should be subordinated to the Commissioner's general responsibilities under FPA Section 10(a), 16 U.S.C. §803(a). Pet. App. 23-24. Any other result would be contrary to several additional and controlling canons of construction: that effect must be given to all provisions of a statute if at all possible, *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 163 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), that a general provision will not nullify a matter that is specifically dealt with in another part of the statute, *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *McEvoy v. United States*, 322 U.S. 102, 107 (1944), and that courts should not adopt an interpretation that would render any provision of a statute superfluous, *Andrus v. Glover Construction Co.*, 446 U.S. 608, 618 n.19 (1980); *Colautti v. Franklin*, 439 U.S. 379, 392

(1979).[11] That holding is further buttressed by FPA Section 10(g), 16 U.S.C. §803(g), which subjects licenses to "such other conditions not inconsistent with the provisions of this Act as the Commission may require." Thus, the Commission's Section 10(g) conditions cannot supersede the powers vested in the Secretaries under Section 4(e). And if there were ambiguity in the statute as a whole, which we emphatically deny, the doubts must be resolved in the Indians' favor. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

Nor is there any conflict or inconsistency between Section 4(e)'s conditioning clause and any other feature of the Act. This Court's task is to harmonize all provisions of the FPA. *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 631-32 (1973); *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947); *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 111-12 (1942). Here that is easily accomplished.

Congress unquestionably centralized authority over hydroelectric licensing in the Commission. Comm. Br. 21. That purpose is fulfilled by insuring that the Commission "coordinate" the functions of all other federal agencies[12] and that all non-federal hydroelectric developments, including those on Indian and other federal reservations, be

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[11]The position advanced by the petitioners and the Commission would deprive the secretarial conditioning clause of all meaning because anyone can recommend that the Commission impose certain conditions on a license. *See, e.g.*, Pacific Power & Light Co. v. FPC, 333 F.2d 698 (9th Cir. 1964) (conditions for fishery protection recommended by State of California).

[12]See the 1918 transmittal letter of the Secretaries of War, Interior and Agriculture to the House of Representatives quoted in Chemehuevi Tribe of Indians v. FPC, 489 F.2d 1207, 1220-21 n.62 (D.C. Cir. 1973), *reversed on other grounds*, 420 U.S. 395 (1975).

subject to licensing by the Commission. It does not require, or even suggest, that the Commission must have ultimate authority over all licensing issues. It would make as much sense to argue that the FPA provisions empowering the Commission to issue licenses for projects on reservations should be disregarded because Congress has granted other federal officials comprehensive management authority over those reservations.

Similarly, the existence of a broad statutory standard authorizing the Commission to determine whether licenses generally are in the public interest, FPA §10(a), 16 U.S.C. §803(a), *see Udall v. FPC*, 387 U.S. 428, 449-50 (1967) is not inconsistent with delegations of final authority over specific areas of concern, such as federal reservations and navigation, to other federal officials. Taken together, these provisions simply mean that all matters affecting the public interest, *except those specifically delegated to other federal officials*, must be considered and addressed by the Commission.

The fact that the Commission is empowered to make the interference/inconsistency finding does not mean that it must have final say over all matters that affect reservations. Rather, the division of responsibilities between the Commission and the Secretaries so evident on the face of the reservation proviso manifests Congress' intent to preserve the integrity of Indian and federal reservations by subjecting them to dual safeguards. In somewhat different ways, both the Commission and the appropriate Secretary must agree that reservation interests are not sacrificed for the sake of hydroelectric developments. *See* Int. Br. 26.[13]

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[13]In an effort to manufacture an ambiguity, petitioners reach out to FPA § 6, 16 U.S.C. § 799. Pet. Br. 33-34. Section 6 pro-

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In short, one can find conflict or ambiguity in the FPA only by starting from the false premise that the Commission necessarily must have ultimate authority over all hydroelectric licensing matters. That supposition simply begs the fundamental issue in this case, is not supported by *anything* in the Act or its history, and is contradicted by no less than five other FPA provisions which also expressly grant final authority over specific matters to federal officials other than the Commission. Since there is no indication anywhere that *Congress* intended to make the Secretaries' §4(e) conditioning authority subject and subordinate to the Commission's overall licensing jurisdiction, that public policy consideration cannot influence this Court's construction of the statute. *See supra* at 21.

Contrary to the arguments of the petitioners and the Commission, there has not been a long-standing and consistent administrative construction that supports their

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vides that licenses "shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe *in conformity with this Act. . . .*" Emphasis added. The provision goes on to state that "[l]icenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice."

Nothing in this general provision either overrides or is the slightest bit inconsistent with the specific authority vested in the Secretaries under the reservation proviso. It certainly cannot be deemed to vest authority in the Commission and the licensee to amend or eliminate the Secretaries' Section 4(e) conditions. Any such "reconditioning" by the Commission plainly would not be "in conformity with this Act." *See also*, FPA § 10(g), 16 U.S.C. § 803(g). FPA Section 6 is so far removed from the issues concerning the Secretaries' Section 4(e) powers that it was not mentioned by the Commission in the discussion of that issue in its opinion, Pet. App. 143-47; was not cited in the Petition as a statutory provision involved in this case, Pet. 2; Pet. App. 381-82; and was not mentioned in the Commission's Brief to this Court or in either of the briefs below.

position. To the contrary, the Commission as well as the Secretaries of Interior and Agriculture have recognized the rights, powers, and responsibilities of the Secretaries over hydroelectric projects involving federal and Indian reservations. *See* Int. Br. 32-36. Even if prior administrative practice supported the Commission's position, it could not override the plain meaning of the reservation proviso. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981).

The efforts of the petitioners and their allies to draw support from previous judicial decisions construing the FPA also are unavailing. Not one of those decisions comes close to addressing the question of whether the Commission may reject or modify the Secretaries' Section 4(e) conditions. In *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), for example, the issue was whether the Tuscarora Tribe's fee lands were subject to the protection of the reservation proviso. Since the Court held that those lands are not encompassed within the Act's definition of "reservations," there was no occasion to consider the scope of the protection afforded by the proviso.

First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946), and *FPC v. Oregon*, 349 U.S. 435 (1955), involved the respective powers of the Commission and the states. Neither case raised any issues pertaining to the reservation proviso.[14] *FPC v. Idaho Power Co.*, 344 U.S. 17, 19 (1952), and *Idaho Power Co. v. FPC*, 346 F.2d

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[14]As previously noted (*supra* at 16-17), the *First Iowa* opinion includes dicta recognizing that the FPA delegates power to both the Commission and other federal representatives. The project at issue in *FPC v. Oregon* was partially located on Indian lands, but no Section 4(e) issues were presented because the Commission did not reject or modify any Secretarial conditions and the Indian tribe had given its consent to the use of its lands. *See* 349 U.S. at 444.

956, 958 (9th Cir. 1965), *cert. denied*, 382 U.S. 957, describe conditions proposed by the Secretaries as recommendations or suggestions. But those conditions were not prescribed pursuant to Section 4(e), and the decisions are therefore irrelevant for purposes of this case.

A holding that the Secretaries' conditions cannot be modified or rejected by the Commission does not prevent the Commission from hearing, considering and evaluating evidence and arguments concerning Section 4(e) conditions. It does not preclude consultation between the Commission and the Secretaries, nor does it bar the Commission from pointing out any defects it perceives in the Secretaries' conditions or from recommending changes.[15] And it does not establish or create any unconditional veto powers. It simply means that when the licensing process is through, the Commission's licenses shall, in conformity with the directive of the reservation proviso, "be subject to and contain" the conditions that the Secretaries deem necessary for the adequate protection and utilization of reservations.

This conclusion has two important ramifications. It means, first, that the Secretaries' conditions, not the Commission's, are entitled to the presumption of validity for purposes of appellate court review. Put another way, the role of the court of appeals will be to determine whether the Secretaries' conditions, not the Commission's substitutes, are reasonable, supported by substantial evidence, and within the scope of authority delegated to the Secretaries. *See* FPA §§4(e), 313(b), 16 U.S.C. §§797(e), 825l(b); Pet. App. 24-25, *modified*, 32-33. *See also*, Pet.

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[15]Mutually satisfactory solutions should be sought no matter who has the final say. FPC v. Oregon, 349 U.S. 435, 449 n.20 (1955).

App. 40-41 (dissenting opinion). Those determinations will be made on the basis of the administrative record compiled before the Commission in the same way that the appellate court would evaluate the validity of the Commission's Section 10(g) conditions.

The second important consequence of holding that Commission licenses must be subject to and contain the Secretaries' conditions is that the substantive content of the conditions will be governed by what is deemed necessary for the adequate protection and utilization of reservations, not by broad concepts of the public interest. *Cf.* Pet. App. 143. As applied to this case, for example, it would mean that the protection and utilization of reservations could not be sacrificed because there was not sufficient water to meet all needs. *See infra* at 32. Cf. Pet. App. 150-51. The needs of the reservations would be primary because that is what Congress so plainly intended.

III.

The Water Rights of the Downstream Reservations Qualify for the Protection Afforded by the Reservation Proviso

The word "reservations" is defined in FPA Section 3(2), 16 U.S.C. §796(2). That definition encompasses not only "tribal lands embraced within Indian reservations," but also: (i) "other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws"; and (ii) "lands and interests in lands acquired and held for any public purposes." Citing numerous authorities, the Court of Appeals concluded that the water rights of Indian reservations clearly are encompassed within the latter parts of this definition. Pet. App. 25-26. Neither the petitioners nor the Commission take issue with this conclusion.

The Court of Appeals went on to hold that the reservations located downstream from the physical facilities licensed under Project No. 176 are entitled to the benefit and protection of the reservation proviso. Pet. App. 26-28. Petitioners and the Commission point out and emphasize that the reservation proviso applies to "licenses issued *within* any reservation." Emphasis added. But they make no effort to reconcile that clause with the Act's definition of "reservations."

The water rights of the Pala, Pauma, and Yuima Reservations clearly qualify as "reservations," so the literal question that is posed concerning the applicability of the reservation proviso to these reservations is whether the license for Project No. 176 is "within" those water rights. That sounds odd because it is unclear what is meant by a license being "within" a water right. There are two choices. Since the word "within" does not make sense, or at the very least is ambiguous, in this context, it could be interpreted as meaning "affecting." We certainly know what it means for a license to affect a reservation's water right and there is no doubt that the license for Project No. 176 affects the water rights of the reservations located downstream from the licensed project works. *See e.g.*, Pet. App. 9, 23. The other alternative is to construe the single word "within" as manifesting an intent to limit the effect of the reservation proviso to projects with licensed facilities physically located within the exterior boundaries of federal reservations notwithstanding the FPA's much more expansive definition of "reservations."

There are several reasons for adopting the former position. First and foremost, the text of two other FPA provisions, Sections 23(b) and 10(e), 16 U.S.C. §§817,

803(e), refutes the argument advanced by the petitioners and the Commission. *See* Int. Br. 40 & 43.

The Court of Appeals' conclusion also is consistent with the purposes underlying both the reservation proviso and the Act's definition of "reservations." The purpose of the reservation proviso is protective, to insure that federal reservations are not adversely affected by hydroelectric developments. *See supra* at 14-18, 19-20, 23. As noted by the Court of Appeals, Pet. App. 27-28, that purpose would be undermined by requiring that projects must be physically located within a reservation's exterior boundaries in order for the proviso to apply. Similarly, the manifest purpose of the Act's expansive definition of "reservations", which clearly encompasses Indian water rights, would be defeated by imposing that restriction. It would also violate the canons of statutory construction that effect must be given to all provisions of a statute if at all possible, that no part of a statute should be rendered superfluous, that courts should strive to harmonize the provisions of a statute and to avoid inconsistencies, and that ambiquities must be resolved in the Indians' favor and in a manner that effectuates the statute's protective purpose. *See* authorities cited *supra at* 21-22. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665-66 (1979); *Smith v. McCullough*, 270 U.S. 456, 463-65 (1926); Pet. App. 27-28. In addition, since much more thought, consideration and attention were likely to have been given to the Act's definition of "reservations" than to the single word "within", it would be unreasonable to accord controlling significance to that one word. *See, e.g., Stafford v. Briggs*, 444 U.S. 527, 535 (1980).[16]

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[16]Contrary to the Commission's argument (Comm. Br. 38), FPC v. Tuscarora Indian Nation, 362 U.S. 99, 114-15 (1960), does not dictate or even indicate a different result. The *Tuscarora*

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The Commission argues that the protection afforded by the reservation proviso should be limited to "tribal lands embraced within Indian reservations" because the Commission lacks jurisdiction to adjudicate water rights. Comm. Br. 37-38. This argument entirely misconceives the nature of the licensing and conditioning functions. Once it is determined that a reservation's water rights are affected by a project, the nature and scope of any conflicting legal claims and legal rights to water have no bearing on the issues that must be addressed by the Secretaries or the Commission.

Here, the project's primary impact on all six Indian reservations is the same; it diminishes the water supply that otherwise would be available for use by the Bands. *See* Pet. App. 9, 23, 150-51. The Commission acknowledged that if the reservation proviso were not applicable, the project's adverse effects on the reservations' water supplies would have to be considered and analyzed under the broad public interest standard of FPA Section 10(a), 16 U.S.C. §803(a). Pet. App. 131-33, 139-40, 173-76. *See Udall v. FPC*, 387 U.S. 428, 449-50 (1967). Therefore, the question is not whether the FPA requires that the effects of the proposed project on the water supply of the Pauma, Yuima and Pala Reservations be taken into account, but whether the consideration of that issue is governed by the general public interest criterion of FPA Section 10(a) or the more specific and stringent standards of the reservation proviso. There is no apparent

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holding was that the "interests in land" encompassed in the FPA's definition of reservations are specific and concrete interests in real property, not abstractions such as the national interest in Indian welfare and protection. That holding is perfectly consistent with the decision below since reservation water rights are interests in real property that are owned by the United States. Pet. App. 26.

reason why the answer to that question should vary depending on whether a reservation happens to be physically touched by a licensed facility such as a road, trail or power line. *See* Pet. App. 27-28.

The analysis of the water issues in this case does not involve the adjudication of water rights regardless of whether that analysis is undertaken pursuant to the standards of Section 4(e) or Section 10(a). The adjudication of water rights is a complex undertaking in which a court determines the amounts of water to which various users are entitled by law and their relative priorities. *See, e.g., Cappaert v. United States*, 426 U.S. 128, 139-41 & n.5 (1976); *Colorado River Water Cons. District v. United States*, 424 U.S. 800, 802-05 (1976). By contrast, neither the reservation proviso nor Section 10(a)'s general public interest standard has anything to do with the resolution of disputed legal claims to water or with the adjudication of legal entitlements. Rather, their concern is with conflicting needs for water, specifically, whether and to what extent the utilization of water by proposed hydroelectric facilities adversely affects other existing or potential uses.[17]

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[17]Though the Commission cannot adjudicate water rights, FPA § 9(b), 16 U.S.C. § 802(b), requires that the Commission "satisfy itself . . . that applicants for . . . licenses have whatever rights are necessary to utilize the water in question in the manner contemplated by their applications and, ultimately, in the manner required by the resulting licenses." Pet. App. 99. *See* First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 177-78 (1946). Therefore, for purposes of the analyses undertaken pursuant to the reservation proviso as well as FPA § 10 (a), 16 U.S.C. § 803(a), it can be presumed that licensees have obtained whatever legal rights are necessary to divert and utilize the waters at issue. Lacking such rights, a license could not issue and Sections 4(e) and 10(a) would be irrelevant. *See also*, FPA § 27, 16 U.S.C. § 821, *construed in* FPC v. Oregon, 349 U.S. 435, 445 (1955) (the use of water in licensed hydroelectric projects cannot interfere with the vested water rights of others.)

If the issue is addressed under FPA Section 10(a), 16 U.S.C. §803(a), the Commission has broad discretion to decide how to make various uses of water as compatible as possible, and, in the event of conflict, to determine which uses best serve the overall public interest. *Udall v. FPC*, 387 U.S. 428, 449-50 (1967). But when reservations are involved, the Commission has no such discretion. The proviso prohibits the issuance of licenses that utilize water for hydroelectric projects in a manner that is inconsistent or interferes with the reservations' purposes. It also authorizes the Secretaries to prescribe conditions that they deem necessary to insure the reservations' adequate protection and utilization. In short, the water needs of reservations come first, not because of their legal entitlements, but because Congress directed that hydroelectric projects cannot be licensed if reservations are adversely affected.

This common sense approach to water related issues under the FPA has long been recognized and carried out by the Commission. The Commission has consistently imposed conditions on licenses requiring that project waters be utilized for purposes other than hydroelectric generation *when there was not even a claim to a water right for the competing use. See Southern California Edison Co.*, 8 FPC 364, 381-86 (1949); *Portland General Electric Co.*, 28 FPC 924, 928-29 (1962), *affirmed, Portland General Electric Co. v. FPC*, 328 F.2d 165, 176 (9th Cir. 1964); *Turlock Irrigation District*, 31 FPC 515 (1964), *affirmed, State of California v. FPC*, 345 F.2d 917, 923-24 (9th Cir. 1965), *cert. denied*, 382 U.S. 941. The rationale for these decisions is that devoting water to competing uses that are deemed to be in the public interest is part of the price that licensees must pay in return for the privileges and rights granted by a license. *State of California*

v. FPC, supra; Portland General Electric Co. v. FPC, supra. See also, United States v. Appalachian Electric Power Co., 311 U.S. 377, 427-28 (1940) (upholding the validity of the FPA's conditions requiring the relinquishment of licensees' water and property rights at the expiration of the license period as "the price which must [be paid] to secure the right to maintain their dam."[18]

While the foregoing decisions and cases have involved conditions imposed pursuant to FPA Sections 10(a), 10(g), 14 and 15, 16 U.S.C. §§803(a), 803(g), 807 and 808, there is no reason why the Secretaries should not be able to carry out their Section 4(e) responsibilities in the same way. That is precisely the approach that the Secretary of the Interior took in formulating conditions to insure the adequate protection and utilization of the six Indian reservations involved in this case. JA 53, 146-51, 163-65, 168-70, 175-81, 222-26. The facts that the Bands and the United

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[18]The same concept is incorporated in Section 8 of MIRA. Under that statute, the grantees of pre-patent canal rights of way are required to supply water to the Indians, not because of the Indians' superior water rights, but as part of the consideration for the right of way.

FPA Section 27, 16 U.S.C. § 821, precludes any interference with state laws governing the appropriation, use and distribution of water or of any water rights acquired pursuant to state law. *See supra* at 31 n.17. But *cf.* Cappaert v. United States, 426 U.S. 128, 144-45 n.10 (1976); FPC v. Oregon, 349 U.S. 435, 446-48 (1955) (federal reserved water rights are established by the withdrawal of power sites from the public domain under the FPA). Section 27 does not, however, prevent the Commission or the Secretaries from requiring that waters controlled by licensees be devoted to other purposes in return for being granted the right to use public lands or reservations. "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals." Nebraska v. Wyoming, 325 U.S. 589, 614 (1945). Imposing water related conditions on the grant of a right of way for a canal or ditch therefore does not affect or interfere with the underlying water right. *See e.g.*, Martinez v. United States, 302 F. Supp. 1069 (D. Colo. 1969). *See also*, United States v. Appalachian Electric Power Co., *supra*, 311 U.S. at 427-28; FPA §§ 10(a), 10(g), 16 U.S.C. §§ 803(a), 803(g).

States have colorable, prior, legal claims to the waters at issue and that San Luis Rey River water rights are in dispute and are being litigated in another forum can neither deprive the Secretaries of their power nor diminish their obligation to prescribe conditions that are necessary for the reservations' protection and utilization. Such conditions are not attributable to, or dependent on, the rights and priorities established by federal or state water laws. Rather, they are part of the price that licensees must pay in return for the privileges obtained by Commission licenses. In this sense, they are voluntary and contractual in nature, the very antithesis of adjudicatory, because they can be accepted or rejected by the licensees. FPA §6, 16 U.S.C. §799; Pet. App. 223, 225.

IV.

Licensing the Use of Tribal Lands for Canal Rights of Way Requires the Bands' Consent

This is an unusual case. The petitioners have applied to a federal agency to obtain permission to use tribal lands within three Indian Reservations, La Jolla, Rincon and San Pasqual, for a canal that diverts water away from those three reservations as well as three additional downstream reservations. The lands of all six reservations are held in trust by the United States for the Bands' sole use and benefit. Since the petitioners' proposed project is so obviously contrary to the interests of the six affected Indian reservations, the three Bands have withheld their consent to the inclusion of their lands in the project. The ultimate irony of this case is that this contral problem was foreseen when MIRA was enacted in 1891 and specific procedures for its resolution were included in Section 8 of that Act.

The issue of whether the use of the Bands' lands can be obtained without their consent under the circumstances

of this case ultimately involves consideration of the relationship of two statutory provisions, the Section 4(e) reservation proviso and Section 8 of MIRA. But that issue of statutory construction cannot properly be understood apart from long-recognized powers of Indian tribes that go back several centuries.

One of the first acts of our Congress was the ratification of the Northwest Ordinance of 1787 which provides:

> The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress. . . .[19]

1 Stat. 50, 52 (1789). While the federal government has authority to extinguish tribal title without obtaining the Indians' consent, *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641 (1890), that raw power has been exercised sparingly. *See*, Cohen, "Original Indian Title," 32 Minn. L. Rev. 28, 33-43 (1947) ("[T]he historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emporor or czar but from its original Indian owners"); *Cohen's Handbook of Federal Indian Law* 53-55 (1982 ed.).

The continuing vitality of this fundamental principle was illustrated twice in recent years, when a congressional committee expressed its outrage at proposed regulations

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[19]This policy is expressed in countless Supreme Court decisions, *e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876); New York Indians (Fellows v. Deniston), 72 U.S. (5 Wall) 761, 768 (1867); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 665 (1979). Its historic origins have been traced to a 1532 treatise by a leading spanish intellectual, Francisco de Victoria. See Cohen's Handbook of Federal Indian Law 50-52 (1982 ed.)

that would have authorized the issuance of rights of way across tribal lands without the Indians' consent, H. R. Rep. 91-78, 91st Cong., 1st Sess. (1969);[20] Pet. App. 18-19, and when Congress enacted a law, 90 Stat. 1275 (1976), repealing a 1926 law that had authorized the condemnation of Pueblo Indian lands in New Mexico (44 Stat. 198) "in order to place the Pueblo Indians in a position of equality with other tribes." H.R. Rep. 94-800, 94th Cong., 2d Sess. 4 (1976). On both occasions, it was recognized that special acts could be passed if the acquisition of Indian lands were required by public necessity and tribes unreasonably withheld their consent. H. R. Rep. 91-78, *supra*, at 9-10, *quoted in* Pet. App. 18; H. R. Rep. 94-800, *supra*, at 3-4; 122 Cong. Rec. 29140 (1976) (remarks of Senator Domenici). *See also*, 25 U.S.C. §§324, 476; 25 C.F.R. §169.3(a). But Congress unequivocally expressed its support for the general principles that tribal consent ordinarily is, and should be, required and that the decision to dispense with that requirement on a case by case basis should rest with the Congress, not officials of the executive branch.

As a corollary of their power to prevent the disposition of their lands without their consent, Indian tribes have long been recognized to possess the authority to exclude non-Indians from tribal lands. *See, e.g., Williams v. Lee*, 358 U.S. 217, 219 (1959); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *Cohen's Handbook of Federal Indian Law* 252 (1982 ed.) This power was recognized and reaffirmed by all members of the Court recently in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-44 (majority opinion),

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[20]The Committee expressed its agreement with "one of the oldest principles of jurisprudence in America—that Indian tribes should not be deprived of rights in their land without their consent." *Id.*, at 17.

160, 173-85 (dissenting opinion) (1982), in which the majority expressly noted its agreement with the dissent's position that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands. . . ." 455 U.S. at 141.[21] *See also, Montana v. United States*, 450 U.S. 544, 557 (1981), *affirming on that issue United States v. Montana*, 604 F.2d 1162, 1165-66 (9th Cir. 1979).

The Bands' sovereign power to exclude non-Indians from their lands arguably provides an independent basis for concluding that licensing the use of the Bands' lands requires their consent. Putting aside for a moment both the reservation proviso and MIRA Section 8, the question would be whether the Federal Power Act (without the reservation proviso) deprives Indian tribes of their pre-existing power to exclude non-Indians from tribal lands. *See Merrion v. Jicarilla Tribe, supra*, 455 U.S. at 149-52 (holding that Indian tribes have not been divested of their power to impose severance taxes). Although this issue was not expressly presented or considered in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Court's analysis and result would lend support to the position of the Commission and the petitioners.[22] But more recent au-

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[21]The dissent characterized the tribes' "power to exclude nonmembers entirely from the territory reserved for the tribe" as "a power unknown to any other sovereignty in this Nation." 455 U.S. at 160 (Stevens, J. dissenting).

[22]*Tuscarora* is directly comparable to the situation that would exist in the absence of the reservation proviso and Section 8 of MIRA because this Court held that the Tuscarora fee lands were not entitled to the protection of the reservation proviso, 362 U.S. at 110-15; *supra* at 25, and that the taking of the Tuscarora's land for the Niagara Falls hydroelectric project did not violate any right granted to the Tuscaroras by treaty or statute, 362 U.S. at 106 n.10, 121 n. 18, 123, 124. Contrary to the arguments of the Commission (Br. 13-14) and the petitioners (Br. 21), *Tuscarora* did not hold that the FPA authorizes

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thorities, particularly *United States v. Mitchell*, 103 S. Ct. 2961 (1983), and *Merrion, supra*, point strongly in the opposite direction. *Mitchell* stands for the proposition that statutes authorizing the federal government to assume control or supervision over tribal properties normally give rise to a fiduciary relationship between the government and the Indians unless Congress has provided otherwise, even though there is no express creation of a trust. 103 S. Ct. at 2972. The continuation of a fiduciary relationship would be inconsistent with an intent to abrogate one of the most fundamental tribal powers. Similarly, *Merrion* holds that the sovereign powers of Indian tribes cannot be divested "in the absence of clear indications of legislative intent" and that any ambiguities on this score must be resolved in the tribes' favor. 455 U.S. at 149, 152. There is certainly nothing in the FPA that expressly abrogates the government's trust obligations or clearly divests the tribes of their sovereign power to prevent the use of their lands without their consent. It is therefore not at all clear that the Bands' lands could be licensed by the Commission without their consent even in

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the abrogation of rights guaranteed to Indian tribes by specific treaties and statutes. Indeed, the concluding sentence of the majority opinion strongly suggests that such rights would survive the Federal Power Act even in the absence of the reservation proviso:

> All members of this Court—no one more than any other—adhere to the concept that agreements are made to be performed—no less by the Government than by others—but the federal eminent domain powers conferred by Congress upon the Commission's licensee, by § 21 of the Federal Power Act, to take such of the lands of the Tuscaroras as are needed for the Niagara project do not breach the faith of the United States, or any treaty or other contractual agreement of the United States with the Tuscarora Indian Nation in respect to these lands for the conclusive reason that there is none.

362 U.S. at 124.

the absence of both MIRA Section 8 and the reservation proviso.[23]

The delegation of authority to the Commission (or any other federal official) to license the use of tribal lands is not, in and of itself, necessarily inconsistent with a requirement of tribal consent. *See, e.g.*, 25 U.S.C. §§324, 476; 25 C.F.R. §169.3(a); *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 393. Cf. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968); *Mott v. United States*, 283 U.S. 747, 751 (1931) (federal officials not authorized to lease Indian lands unless the Indian owners agree). Of course, the existence of such authority does mean that the Commission's concurrence is a necessary, though not a sufficient,

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[23]The Commission originally gave three reasons for its rejection of the Bands' contention that they have the sovereign power to prevent the petitioners from using tribal lands without the Bands' consent: that tribal self-government pertains to internal, not external matters; that the reservations were not created for the purpose of granting self-government since the Bands' sovereignty is inherent; and, as a fallback position, that the Bands' exercise of any sovereign power that they might have to prevent the licensing of their lands would be inconsistent with the FPA and therefore was repealed by FPA Section 29, 16 U.S.C. § 823. Pet. App. 141-42. The third point is answered in the text, *infra*, at 39-42. With regard to the first, *Merrion* leaves no doubt that tribal sovereignty encompasses the power to exclude non-Indians from Indian lands. And while it is true that the reservations were not established in order to grant sovereignty to the Bands, nothing in the FPA requires a showing that any purpose came about solely as a result of the establishment of the reservation. Indeed, virtually all Indian rights predate the establishment of reservations. Washington v. Fishing Vessel Ass'n, 443 U.S. 568, 679-81 (1979); United States v. Wheeler, 435 U.S. 313, 322-23 (1978). Since reservations are places where the Indians can "make their own rules and be ruled by them," White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1982), *quoting* Williams v. Lee, 358 U.S. 217, 220 (1959), and be free of unwanted intrusions by non-Indians, *Merrion, supra*, licensing the use of tribal lands without the tribes' consent interferes and is inconsistent with that self-government purpose.

condition for tribal lands to be used in hydroelectric projects. *See* Pet. App. 21.[24] Whether requiring tribal consent is inconsistent with the powers granted to the Commission depends on the Act's ultimate purpose. Tribal consent would not be consistent with the Act if the intent of the FPA were to subordinate Indian interests to the development of hydroelectric projects. But requiring consent would be compatible with a policy of developing and authorizing projects that are consistent with the reservations' purposes and the government's fiduciary responsibilities. *See* Pet. App. 27; *Arizona Power Authority*, 39 FPC 955, 958 (1968) (Commission imposed condition requiring Tribe's consent to the use of tribal waters in hydroelectric projects).

The existence of the reservation proviso and Section 8 of MIRA tips the balance overwhelmingly in the Bands' favor. As discussed *supra* at 6-10, the overall purpose of MIRA was to protect and preserve the property rights of the Mission Bands so that the deplorable conditions under which they were living would be improved and they would eventually be able to become economically self-sufficient. The particular purpose of Section 8 of MIRA was to vest the Mission Bands with power to prevent encroachments on their vitally needed water supplies one trust patents were issued. *See supra* at 10-14. The existence of the reservation proviso negates any possible inference that the FPA was intended to permit uses of tribal lands in a manner that works to the detriment and disadvantage

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[24]As noted by the Commission (Br. 28 n.31) and the petitioners (Br. 17), the general act authorizing grants of rights of way across Indian lands, 25 U.S.C. §§ 323 *et seq.*, includes a provision exempting rights of way granted under the FPA. This means that uses of tribal lands for hydroelectric projects cannot be authorized without the Commission's approval.

of the Indian owners and manifests Congress' intent to preserve preexisting Indian rights and powers. *Supra* at 14-18; App. 21; *Lac Courte Oreilles Band v. FPC*, 510 F.2d 198, 210-12 (D.C. Cir. 1975). Accordingly, Section 8 of MIRA was not affected by FPA Section 29, 16 U.S.C. §823, which only repeals "all Acts or parts of Acts inconsistent with this Act.[25]

As a theoretical matter, it is just as logical to conclude that the powers delegated to the Commission under the FPA would be exercised in a manner that would be fully consistent with the government's fiduciary relationship and the tribes' preexisting powers as it would to assume that Indian interests would be subordinated to hydroelectric developments and that requiring tribal consent therefore would be likely to thwart the FPA's policies. As a legal matter, the continuation of the fiduciary relationship and the preservation of tribal sovereignty are presumed absent clear indications to the contrary. ***United States v. Mitchell, supra; Merrion, supra; United States v. Santa Fe Pacific R. Co.***, 314 U.S. 339,

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[25]The Commission's original reason for rejecting the Bands' and Interior's reliance on Section 8 of MIRA was its contention that that provision did not apply to the issuance of rights of way for canals, ditches and the like. Pet. App. 156-57. That argument has not been renewed by the Commission or the petitioners in this Court or in the Court of Appeals, and for good reason. The next to the last sentence of Section 8 expressly refers to grants of rights of way or easements. One way, indeed the most common way, of granting permission to construct ditches or canals is by granting rights of way. The legislative history of Section 8 shows that it was proposed by the Interior Department for the specific purpose of granting rights of way for canals and ditches, H.R. Rep. 3282, 50th Cong., 1st Sess. 3, 4 (1888), and that that was the shared understanding of the Congress, 22 Cong. Rec. 311 (1890), quoted *supra* at 12. The 1894 agreement with the Potrero Band, which was entered into and approved pursuant to Section 8 only three years after MIRA's enactment, see Pet. Br. 23 & n.36, expressly grants "a right of way [across the La Jolla Indian Reservation] for the purpose of constructing, operating and maintaining an irrigating flume or canal . . ." JA 9, 14.

353-54, 356, 360 (1941). As a matter of statutory construction, the reservation proviso is conclusive proof that the FPA does not sanction any interference with the economic or sovereign purposes of Indian reservations and that the FPA is not inconsistent with MIRA.

This result is also supported by the rule that the Court will construe two statutes in a manner that gives effect to both while preserving their sense and purpose, rather than subordinating one to the other. *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *Morton v. Mancari*, 417 U.S. 535, 551 (1974); Pet. App. 21. As noted *supra* at 37-38 n.22, *Tuscarora* also strongly suggests that rights specifically granted Indian tribes by treaty or statute are not overridden by the Federal Power Act even if the Indian lands at issue are not subject to the protection of the reservation proviso.[26]

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[26]The petitioners argue that Section 8 of MIRA and the FPA should be viewed as alternate means of acquiring canal rights of way across Mission Indian Reservations. Pet. Br. 26-28. They cite several lower court decisions holding that various kinds of rights of way across Indian allotted lands can be obtained either under a general condemnation statute, 25 U.S.C. § 357, or under general right of way statutes such as 25 U.S.C. § 311 and 25 U.S.C. §§ 323 and 324. *But cf.*, Minnesota v. United States, 305 U.S. 382, 391 (1939) (issue left open).

There are three major difficulties with applying the reasoning of those decisions to this case. First, the FPA's reservation proviso expressly prohibits the acquisition of interests in tribal lands in a manner that interferes or is inconsistent with the purposes and policies of laws establishing reservations. There were no comparable provisions in the statutes at issue in those cases. Second, the cases cited by the petitioners involve the relationship between a general statute authorizing the condemnation of allotted Indian lands and general statutes authorizing grants of rights of way across tribal lands. They have nothing to do with the effect to be given to a very specific protective provision of a law that is applicable to a very limited number of reservations. Third, the decision cited by the petitions refuse to find that the earlier condemnation statute was repealed by the subsequent right of way acts. In this case, it is the petitioners and the Commission who are contending that the later statute, the FPA, implicitly repealed the earlier one, MIRA Section 8. *See also, infra*, at 45-46.

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Petitioners and the Commission place their principal reliance on the history of a proposed amendment to the FPA that would have expressly granted tribes on treaty reservations the power to withhold their consent to the inclusion of tribal lands in Commission licensed projects. Comm. Br. 27; Pet. Br. 14-16. The amendment passed the Senate, 59 Cong. Rec. 1570 (1920), but was eliminated in conference because "the conferees saw no reason why water power should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." H.R. Rep. 910, 66th Cong., 2d Sess. 8 (1920).

This Court has frequently cautioned that "unsuccessful attempts at legislation are not the best guides to legislative intent." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969), *quoted in Milwaukee v. Illinois*, 451 U.S. 304, 332 n.24 (1981). *See also, Bryant v. Yellen*, 447 U.S. 352, 376 (1980); *Helvering v. Clifford*, 309 U.S. 331, 337 (1940). The Conference Committee's only stated reason for rejecting the tribal consent amendment was its unwillingness to accord special treatment to uses of tribal lands for hydroelectric projects. This indicates that Congress' intent was for hydroelectric projects on tribal lands to be governed by the same rules that generally are applicable to other proposed uses of tribal lands

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Petitioners also refer to the reservation in the trust patents for the La Jolla, Rincon and San Pasqual reservations for rights of way for ditches or canals constructed by the authority of the United States. Pet. Br. 22. This provision was included in the patents pursuant to the Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 945. As applied to reservations established pursuant to MIRA, rights of way for ditches or canals constructed by the authority of the United States must be obtained pursuant to Section 8. In any event, this provision has no application to the lands of the Rincon and La Jolla Reservations which were set aside for Indian use prior to August 30, 1890. See Rights of Way, Flathead Reservation, 58 Int. Dec. 319 (1943); *supra* at 9 n. 3.

by non-Indians. That purpose was achieved by insuring that Commission licenses do not interfere and are not inconsistent with the reservations' purposes. There is no indication that any legal research was conducted, or that anyone in Congress considered whether Indian tribes generally possess the power to exclude non-Indians from their lands. *Cf. Bryan v. Itasca County*, 426 U.S. 373, 391-92 (1976); *FPC v. Union Electric Co.*, 381 U.S. 90, 105 (1965).[27] There was certainly no manifestation of congressional intent to abrogate any tribal sovereign power, to make it easier to obtain the use of tribal lands for hydroelectric facilities than for other proposed projects, or to deprive tribes of the benefit of their fiduciary relationship with the government. Most importantly for our purposes, the conferees did *not* state that the amendment was stricken because Indian interests should be subordinated to proposed power developments or because it was thought that an Indian consent requirement would interfere and be inconsistent with the overall policy of the FPA.[28]

Thus, under the generally applicable rule of construction, Congress' ultimate rejection of the tribal consent amendment is entitled to very little weight. Still less can that history be relied on to support a finding that the sovereign powers of Indian tribes were implicitly abrogated. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S.

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[27]This is not surprising in view of the fact that the use of Indian lands for hydroelectric projects was only one aspect of the entire bill.

[28]The petitioners quote several statements of Senators who opposed the tribal consent amendment on the Senate floor. Pet. Br. 14-16. These remarks are not entitled to any weight, however, because the amendment was adopted by the entire Senate and the only reason given by the conferees for not including the amendment in the final version of the bill was their unwillingness to treat proposed uses of tribal lands for water power projects any differently than other kinds of projects.

49, 62-66, 72 (1978) (Court refused to interpret a statute in a manner that "intrudes" on tribal sovereignty even when one of its acknowledged purposes was to strengthen the position of tribal members against tribes); *Bryan v. Itasca County*, 426 U.S. 373, 387-89 & n.14, 392 (1976) (Court refused to construe "admittedly ambiguous" statute that promoted assimilation of Indians in a manner that would undermine or destroy tribal governments); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it.") And even less can that history be construed as an implicit repeal of Section 8 of MIRA. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 468, 470 & n.10 (1982) (implied repeal must be evident from the language or operation of a statute); *TVA v. Hill*, 437 U.S. 153, 189 (1978); *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

Finally, the Bands' consent should be required under the particular facts of this case even if it is assumed *arguendo* that the FPA would abrogate the sovereign power of the Bands' to exclude non-Indians from tribal lands and would operate as a repeal of MIRA Section 8 in other circumstances. The primary purpose of Project No. 176 is the diversion and conveyance of water; the generation of power clearly is an incidental and secondary function. Pet. App. 13-14, 338; Int. Br. 1-2, 8, 48-49. Section 8 of MIRA is the specific statute that governs the acquisition of rights of way for water conveyance facilities across Mission Indian Reservations. The principal purpose of the Federal Power Act, by contrast, is "licensing the construction, operation and maintenance of facilities for the development of [hydro]electric power. . . ." Pet. App. 338. *See also*, Pet. App. 145; *Chemehuevi Tribe of*

Indians v. FPC, 420 U.S 395, 405 (1975). Accordingly, the issuance of canal rights of way for this project should be governed by MIRA Section 8 because its provisions are more closely associated with the specific substance of this particular controversy, even if an Indian consent requirement would not be applicable to projects whose primary and essential purpose is the development of hydroelectric power. *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Bowman v. Texas Educational Foundation*, 454 F.2d 1097, 1101 (5th Cir. 1972). As explained in *Radzanower* (*quoting* T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 98 (2d ed. 1874)):

> [W]hen the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.

If there are any doubts concerning this issue of statutory construction, the Court "must be guided by that 'eminently sound and vital canon' . . . that 'statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians,'" *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (citations omitted), and in a manner that "'comport[s] with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (citation omitted).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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February, 1984